STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VINCENT TERRELL OWENS,

Defendant-Appellant.

UNPUBLISHED
August 12, 2003

No. 237239
Macomb Circuit Court
LC No. 01-000107-FC

Before: Donofrio, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to a prison term of ten to twenty-five years. He appeals as of right. We affirm.

Defendant's convictions arise from allegations that, in the early morning hours of November 14, 2000, he and codefendant Mark Dwayne McCadney robbed a Roseville gas station, located near I-94 and Ten Mile. The complainant gas station attendant testified that, on November 13, at approximately 6:00 p.m., defendant came into the store, bought some instant lottery tickets, and asked when the lottery machines would be closed. The complainant responded that they would be closed at midnight.

At approximately 1:00 a.m., defendant returned to the station, and asked to cash a lottery ticket. When informed that the machines were closed, defendant requested an instant lottery ticket. The complainant testified that, when he turned around after retrieving a ticket, defendant was pointing a gun at him. The complainant instantly raised his hands. Defendant directed the complainant to put his hands down, treat him like a regular customer, and "just open the cash register." The complainant complied, and gave defendant approximately $225. Defendant then directed the complainant to give him several instant lottery tickets. Defendant thereafter broke the phone, and told the complainant to go into the back room "if [he didn't] want to die . . . ." The complainant came out of the back after he heard a bell indicating that defendant had left the store. The complainant saw a police car and motioned it to follow the defendants' car.

Roseville Police Officers Steven Boucher and Thomas Pfeifer testified that, when they entered the gas station's parking lot, they observed the codefendant, who was driving a silver or gray older model Oldsmobile, continuously look at the police car. The codefendant then started to slowly pull away from a pump. Shortly thereafter, defendant came out of the gas station

holding instant lottery tickets and other unidentifiable things. He walked by the police car, and then ran to the Oldsmobile, which was still moving toward the exit. After defendant got into the car, it quickly accelerated out of the lot. When the officers pulled toward the front of the gas station, they observed the complainant banging on the window and pointing in the direction of the Oldsmobile. The officers pulled behind the vehicle, activated their emergency lights and siren, and shined a spotlight directly on the car. The defendants did not stop, but fled from the police at a high-rate of speed. During the ensuing police pursuit, defendant threw objects out of the car window.

Eventfully, the car stopped in a police station parking lot, and the defendants exited and ran in different directions. Officer Boucher chased and eventually assisted in capturing the codefendant. Officer Pfeifer chased and captured defendant. No weapon was recovered from either defendant, or from the area traveled during the pursuit. However, officers recovered several lottery tickets from inside defendant's jacket, and $160 from the front pocket of his pants. The codefendant had three twenty-dollar bills on his person, and a small bag of cocaine. Defendant indicated that, during the police chase, he gave the codefendant three twenty-dollar bills.

At the Roseville Police Station, defendant initially refused to allow the officers to book or fingerprint him. Defendant testified that he agreed to speak to the police after he heard the codefendant falsely accuse him of carjacking. In a statement made to the police, defendant stated that he agreed to speak with the police because he did not want to be charged with armed robbery when he did not have a gun. Defendant admitted that he planned and robbed the gas station, but denied being armed with a weapon. He claimed that, when he walked into the gas station, he had his finger sticking out of his sleeve.

During trial, defendant again admitted that he committed an unarmed robbery but, contrary to his statement, denied ever sticking out his finger at the complainant. Defendant maintained that he never had a gun, never simulated anything to look like a gun, and never threw a gun out of the car window during the police chase.

I

Defendant first argues that, although he committed an unarmed robbery, there was insufficient evidence to support his conviction for armed robbery. Specifically, defendant asserts that, because the police failed to recover a weapon even though they had him under surveillance from the time he left the gas station until he was apprehended, there was no evidence that he was armed. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d

692 (1996). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute. *People v Rodgers*, 248 Mich App 702, 707; 645 NW2d 294 (2001). Defendant challenges only the third element, i.e., that he was armed with a weapon. In order to constitute armed robbery, the accused must have been armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person assaulted to reasonably believe it to be a dangerous weapon. *People v Jolly*, 442 Mich 458, 465; 502 NW2d 177 (1993). There must be "some objective evidence of the existence of a weapon or article." *Id*. at 468; see also *People v Taylor*, 245 Mich App 293, 297-298; 628 NW2d 55 (2001). A subjective belief that a weapon exists is insufficient to satisfy the armed robbery statute. *People v Banks*, 454 Mich 469, 472; 563 NW2d 200 (1997); *People v Saenz*, 411 Mich 454, 458; 307 NW2d 675 (1981).

The evidence in this case, viewed in a light most favorable to the prosecution, was sufficient to enable a jury to infer that defendant was armed with a weapon during the robbery. Contrary to defendant's argument, the evidence adduced at trial went well beyond a mere subjective belief that defendant was armed. Rather, there was ample objective evidence that defendant either had a gun or simulated one so as to deliberately lead the complainant to reasonably believe he had a gun. The complainant testified that, when defendant walked into the gas station, his hands were in his jacket pocket. The complainant further testified that defendant asked him for an instant lottery ticket and, when he turned around with the ticket, defendant pointed a black gun at him. The complainant explained that defendant held the gun with his right hand and covered it with his left hand. The complainant testified that he was "[o]ne hundred percent" certain that he "saw the gun." In addition to his visual observation, the complainant testified that, after he complied with defendant's command to turn over cash and lottery tickets, defendant stated, "if you don't want to die mother f**ker, go [to the] backroom." A jury could have reasonably surmised that defendant's verbal death threat supported a finding that he had a gun.[1]

Further, although the police were unable to locate a weapon, there was evidence that, during the officers' 7-1/2 mile high-speed pursuit of the defendants, they observed objects being thrown from the car onto the expressway. Additionally, a police squad car camera captured a "metallic small type object" being thrown onto an expressway embankment area near a construction zone. Contrary to defendant's assertion, given the evidence that an object was thrown from the car window and the circumstances and environment during which it was thrown, i.e., onto an expressway during a high-speed chase, the fact that a weapon was not recovered did not prohibit a jury from reasonably inferring that defendant possessed a gun at the time of the robbery. Additionally, although defendant denied being armed, the jury was entitled to weigh the evidence and conclude that his assertion was not worthy of belief. See *People v*

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[1] Defendant even testified that he told the complainant, "this is a stick up mother f**ker." Although, based on defendant's testimony, he did not specifically threaten to shoot the complainant, the phrase "this is a stick up" could reasonably be understood to indicate the presence of a weapon.

Perry, 460 Mich 55, 63; 594 NW2d 477 (1999), and *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989). In sum, the evidence, viewed in a light most favorable to the prosecution, was sufficient to sustain defendant's conviction of armed robbery.[2]

II

Defendant also argues that the prosecutor impermissibly cross-examined him regarding his previous use of an alias. We disagree.

Because defendant did not object to the prosecutor's conduct below, this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights, i.e., affecting the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

During the prosecutor's cross-examination of defendant, the following exchange occurred:

> *Q*. You want to be honest here in front of this jury, correct?
>
> *A*. That's correct.
>
> *Q*. Just like you were honest with [the officer] when he talked to you that day [about the presence of a gun]?
>
> *A*. That's correct.
>
> *Q*. Okay. And along those lines, why don't you tell the jury by what other name you go by other than Vincent Owens?
>
> *A*. In the past?
>
> *Q*. Yes.

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[2] We also note that defendant's reliance on *Banks*, *supra*, is wholly misplaced. In *Banks*, the Court concluded that the evidence was insufficient to support an armed robbery conviction, stating:

> The victim *did not see* any weapon, nor did she see any article fashioned as a weapon. It *was not threatened* that she would be shot if she did not comply with the robbers' demands. There was no objective evidence that defendant's accomplice was "armed with a dangerous weapon, or any article used or fashioned in a manner to lead the [victim] . . . to reasonably believe it to be a dangerous weapon . . ." [*Banks, supra* at 480-481 (emphasis added).]

Unlike *Banks*, here, the complainant indicated that he was certain that he saw a gun, and that his life was threatened if he did not comply with defendant's command that he go into a back room.

A. I've used my brother's name to avoid going to jail.

* * *

Q. Use that name often?

A. No, I've only used it that once.

Q. To avoid going to jail?

A. Yes, sir.

This Court has held that a defendant's use of an alias is relevant to his credibility. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997); see also *People v Pace*, 98 Mich App 714, 718; 296 NW2d 345 (1980), and *People v Dietrich*, 87 Mich App 116, 138-139; 274 NW2d 472 (1978), rev'd in part on other grounds 412 Mich 904 (1982). However, in *People v Thompson*, 101 Mich App 609, 613; 300 NW2d 645 (1980), this Court held that it is improper for a prosecutor to inquire about a defendant's use of an alias on some past, unspecified occasion. The Court determined that the introduction of the mere fact that a defendant had previously used an alias "would [improperly] permit an inference of nonspecific misconduct," and, thus, could be highly prejudicial. *Id*. (emphasis in original). The Court clarified, however, that the use of an alias in connection with or in furtherance of some "specific ignoble purpose" might "be admissible under MRE 608 and MRE 609 to affect credibility." *Thompson, supra* at 613-614.

Here, defendant categorically denied that he possessed a weapon at the time of the robbery and, therefore, his credibility was at issue. Further, the prosecutor did not know only that on some unspecified past occasion defendant had used an alias, but, significantly, knew that defendant had utilized the alias for the ignoble purpose of concealing his identity to circumvent going to jail. Thus, the prosecutor's inquiry during cross-examination, which linked defendant's past use of an alias to evade jail with his intent to deceive the police in this case, was relevant to defendant's credibility and was not improper. *Id*. at 614; MRE 608. Accordingly, defendant has failed to demonstrate plain error.

Defendant also argues that defense counsel was ineffective for failing to object to the testimony regarding his use of an alias. Because defendant failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Here, because evidence of defendant's prior use of an alias to avoid jail was admissible, any objection would have been futile. Counsel is not required to make a frivolous objection, or advocate a meritless position. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), and *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Additionally, even if the evidence regarding defendant's use of an alias was inadmissible, given the brief references to this evidence, defense counsel reasonably may have determined that an objection would have called more attention to the testimony in question. *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, even if counsel was ultimately mistaken, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Moreover, in light of the unchallenged evidence introduced at trial, it is unlikely that the challenged evidence affected the outcome of the case. Accordingly, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged failure to object, the outcome would have been different. *Effinger*, *supra*. Therefore, defendant is not entitled to a new trial on this basis.

III

Defendant's final claim is that he was denied a fair trial by several instances of prosecutorial misconduct. We disagree.

Because defendant did not object to the prosecutor's comments below, this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights. *Carines*, *supra*; *Schutte*, *supra*.

Our review of the record reveals that, viewed as a whole and in context, none of the challenged comments rise to the level of error requiring reversal. Defendant argues that the prosecutor denigrated him by referring to him as "street smart," and referring to his testimony as "entertaining." A prosecutor "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *Bahoda*, *supra* at 283. In this case, however, viewed in context, the prosecutor's remarks represented his contention that, based on the evidence, defendant's testimony was clever and incredible, which was not improper. A prosecutor may argue that a testifying defendant is not worthy of belief, and is not required to phrase arguments and inferences in the blandest possible terms. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996); *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Accordingly, this claim does not warrant reversal.

Defendant also argues that, during closing argument, the prosecutor impermissibly referred to the jurors individually, and urged the jurors to place themselves in the position of the victim or other crime victims. Initially, we note that defendant fails to cite any support for his claim that simply referring to the jurors individually is improper and prejudicial. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (citation omitted).

In any event, although prosecutors are generally prohibited from asking the jurors to place themselves in the position of the victim, *People v Cooper*, 236 Mich App 643, 653-654;

601 NW2d 409 (1999), here, viewed in context, the prosecutor's remarks were not the type of remarks that were likely to evoke sympathy for the victim or elicit the jurors' fears of being victimized themselves. Instead, they rationally suggested that the complainant was credible and worthy of belief. In this case, the complainant was from a foreign country, and there was conflicting testimony regarding whether defendant was armed. The prosecutor asked the jurors to understand that they all came from various backgrounds, noted some of those backgrounds, and asked the jurors to rely on their life experiences and common sense when deciding whether to believe the victim. Further, the challenged remarks occurred before a lengthy discussion of the evidence, comprised only a brief part of the argument, and were not so inflammatory that defendant was prejudiced. See *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999). Moreover, the trial court's instructions that the lawyers' comments are not evidence, and that the jurors should not be influenced by sympathy or prejudice were sufficient to cure any perceived prejudice. *People v Long*, 246 Mich App 582; 588; 633 NW2d 843 (2001), citing *Bahoda*, *supra* at 281. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, this claim does not warrant reversal.

Defendant next claims that the prosecutor impermissibly argued facts not in evidence when he implied that the defendants had stolen the getaway car, and robbed the gas station because they needed more money to buy drugs:

> [The codefendant] drove [defendant] there, undisputed. We know he drove him there in somebody else's car. Neither of these guys owned the car. Some gentleman from Lapeer owned the car. [The codefendant] drove somebody else's car with [defendant] to Ten Mile and I-94. They drove there from a crack house, a dope house, at Harper and Connor, and I want you to rely upon every day life experiences. If you need more dope, where are you going to go if you're out of money? If you need more money to buy more dope, right? They both left the house together to go.

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, a prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *Bahoda*, *supra* at 282; *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). Contrary to defendant's claim, the prosecutor's comments, which were focused on refuting the codefendant's claim that he was not a knowing participant in the crime, were reasonable inferences based on the evidence. At trial, it was undisputed that the codefendant was the driver, and that neither he nor defendant owned the car. In addition, there was evidence that, immediately before the robbery, the defendants were at a "dope house," and left together en route to the gas station. There was also evidence that the defendants passed other gas stations between the "dope house" and the targeted station because defendant intended to rob that particular station. A prosecutor may use "hard language" when it is supported by the evidence, and is not required to phrase arguments and inferences in the blandest possible terms. *Ullah*, *supra*. Accordingly, this clam does not require reversal.

We reject defendant's claim that he is entitled to a new trial because the prosecutor vouched for the complainant when he stated: "but [the complainant] told you how this has affected him for somebody who imagined a gun, just dreamt it up. He quit his job, still has nightmares about it. Is this all a figment of his imagination?" A prosecutor may not vouch for

the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully, or express his personal opinion about the defendant's guilt. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Here, viewed in context, the prosecutor did not improperly vouch for the complainant's credibility, but rather permissibly advanced a rational argument in support of the complainant's credibility on the basis that he had no motivation to falsely accuse defendant of armed robbery and that his subsequent conduct supported his claim that defendant was armed with a gun. A prosecutor may argue from the evidence that a witness is credible. See *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997); *Fisher*, *supra*. Further, in addition to the challenged comments, the prosecutor explained that the jury could infer that the complainant was credible based on the evidence, and cited the evidence and inferences therefrom to establish that he was credible. Moreover, the trial court instructed the jurors that they were the sole judges of the witnesses' credibility, and that the lawyers' comments are not evidence, which was sufficient to cure any perceived prejudice. *Long*, *supra*. Accordingly, this claim does not warrant reversal.

We also reject defendant's claim that the prosecutor argued facts not in evidence when he stated that the jurors should not believe defendant's testimony that he was honest, given his previous use of an alias and initial reluctance to cooperate with the police. Here, there was evidence that defendant had previously used an alias to evade jail and that, in this case, he initially refused to be booked or fingerprinted, and did not talk to the police until he heard the codefendant accuse him of carjacking. Accordingly, because the prosecutor properly argued that defendant was not worthy of belief based on reasonable inferences from the evidence, this claim does not warrant reversal. *Launsburry*, *supra*; *Fisher, supra.*

Defendant next argues that the prosecutor misstated the law when he stated the following:

> You aren't going to hear anything about the law on felony firearm because he's not charged with that. And I can tell you right now [defense counsel] says it's a serious offense, it's not a very serious offense, and you aren't going to hear anything about it other than what the attorneys say.
>
> [Defense counsel] says they would have charged him had they found a gun. Well, let me tell you something else about felony firearm is we have to prove that the gun is operational. In other words, it's a real gun. That's something else we have to prove as well. So, if it's a toy gun or a BB gun, that doesn't count, okay? Just something you need to know, so you have the whole picture on why felony firearm charges aren't brought.

As previously indicated, defendant did not object to this comment below and, thus, we review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, *supra*. Defendant has not shown that the prosecutor's comment affected his substantial rights. Although the prosecutor initially indicated that the gun must be operational,[3] he clarified that the gun must be "a real gun." A person in possession of a toy gun may not be convicted of felony-

[3] "Operability is not and has never been an element of felony-firearm." *People v Thompson*, 189 Mich App 85, 86; 472 NW2d 11 (1991).

firearm. *People v Broach*, 126 Mich App 711, 714; 337 NW2d 642 (1983). Further, the prosecutor's remark, that was made during rebuttal argument, was focused on refuting defense counsel's claim made during closing argument that, if defendant really possessed a gun during the robbery, he would have been charged with felony-firearm. Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). Moreover, the trial court instructed the jury that the lawyers' comments are not evidence, that the case should be decided on the basis of the evidence, and that the jury should follow the law as instructed by the court. The court's instructions were sufficient to cure any perceived prejudice stemming from the prosecutor's improper comment. *Long*, *supra*. In sum, defendant has failed to show a plain error affecting his substantial rights. *Carines*, *supra*.

We also reject defendant's claim that he is entitled to a new trial because the prosecutor improperly vouched for the complainant when he stated: "I don't think [the complainant] was trying to trick or mislead anybody . . ." The prosecutor's comment, that was made during rebuttal, occurred at the end of a lengthy discussion of the evidence, was isolated, and was not so inflammatory that defendant was prejudiced. See *Mayhew*, *supra*. Further, immediately before and after the challenged comment, the prosecutor explained that the jury could infer that the complainant was credible based on the evidence, and restated the pertinent evidence. Moreover, as previously indicated, the trial court instructed the jury that the lawyers' comments are not evidence, and that they were the judges of the witnesses' credibility, which was sufficient to cure any perceived prejudice. *Long*, *supra*. Accordingly, this claim does not warrant reversal.

Defendant next claims that the prosecutor improperly denigrated defense counsel when, during rebuttal, he remarked that defense counsel was being untruthful when he stated during closing argument that the defense did not know anything about the case until the complainant testified. A prosecutor may not personally attack the credibility of defense counsel. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). In this case, however, the argument did not involve a "personal attack" on defense counsel, but was a response to defense counsel's contention that at the time "[they] saw [the complainant] . . . [they] had not heard the rest of the case, [they] didn't know anything about this case." The prosecutor explained that the defense had each police report that the prosecution had in preparation of trial. The prosecutor's argument was not improper. Moreover, even if the challenged comment could be viewed as improper, otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *Duncan*, *supra*; *Simon*, *supra*. Accordingly, this claim does not warrant reversal.

Defendant's final claim of prosecutorial misconduct is that the prosecutor appealed to the jurors' civic duty when he stated that the defendants should not get "a break," that "[the defendants] didn't give [the complainant] one that night," and that the jury should "send [the defendants] a message . . . and be confident knowing what [they] did was the right thing . . ." Prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jurors, or arguments that appeal to the jury to sympathize with the victim. *Bahoda*, *supra* at 266-267; *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). Here, the prosecutor's comments, which were made during rebuttal, occurred at the end of a lengthy discussion of the evidence, were isolated, and were not so inflammatory that defendant was prejudiced. See *Mayhew*, *supra*. Moreover, to the extent that the challenged remarks could be viewed as

improper, the instructions that the jury should not be influenced by sympathy or prejudice, that the lawyers' comments are not evidence, and that the case should be decided on the basis of the evidence were sufficient to cure any prejudice. *Long*, *supra*. In sum, because the prosecutor's comments did not deny defendant a fair trial, reversal is not warranted.

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell